(5)

No. 04-169

FILED
FEB 2 2 2005
OFFICE OF THE CLERK

In The
Supreme Court of the United States

GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT; CHEROKEE COUNTY SOIL & WATER CONSERVATION DISTRICT; GERALD PHILLIPS; ALLEN DEHART; LLOYD MILLSAPS; BILL TIPTON; C.B. NEWTON; EDDIE WOOD,

Petitioners,

v.

UNITED STATES OF AMERICA EX REL. KAREN T. WILSON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF *AMICI CURIAE* INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AND NATIONAL LEAGUE OF CITIES IN SUPPORT OF PETITIONERS

JOHN CHARLES THOMAS
Counsel of Record
M. CHRISTINE KLEIN
HUNTON & WILLIAMS LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219
(804) 788-8200

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	2
ARGUMENT	4
A. The Fourth Circuit's Interpretation of the False Claims Act Would Cause Local Governments to Suffer Widespread and Unique Harm Contrary to the Public Interest	4
B. A Proper Reading of § 3731 Shows That It Applies Only to the False Claims Provisions of § 3730	9
C. The Fourth Circuit's Suggestion of an Equitable "Escape Hatch" Undercuts the Purported Goals of Repose and Administrative Simplicity	11
CONCLUSION	17

TABLE OF AUTHORITIES

Page

CASES

Bradley v. Val-Mejias, 379 F.3d 892 (10th Cir. 2004) 14

Cada v. Baxter Healthcare Corp., 920 F.2d 445 (7th Cir. 1990) 16

Cook County, Illinois v. United States ex rel. Chandler, 538 U.S. 119 (2003) 1, 4, 5

Delaware State Coll. v. Ricks, 449 U.S. 250 (1980) 6

Early v. Bankers Life and Cas. Co., 959 F.2d 75 (7th Cir. 1992) 6

English v. Pabst Brewing Co., 828 F.2d 1047 (4th Cir. 1987) 14, 15, 16

First United Methodist Church of Hyattsville v. United States Gypsum Co., 882 F.2d 862 (4th Cir. 1989) 14

Muñoz v. Ashcroft, 339 F.3d 950 (9th Cir. 2003)..... 14

Neal v. Honeywell, Inc., 33 F.3d 860 (7th Cir. 1994) 12, 13

Nesladek v. Ford Motor Co., 46 F.3d 734 (8th Cir. 1995) 13

Price v. Litton Bus. Sys., Inc., 694 F.2d 963 (4th Cir. 1982) 15, 16

Rogan v. Giant Eagle, Inc., 113 F. Supp. 2d 777 (W.D. Pa. 2002) 6

Smith v. City of Chicago, 769 F.2d 408 (7th Cir. 1985) 6

Storey v. Patient First Corp., 207 F. Supp. 2d 431 (E.D. Va. 2002)..... 12, 13

United States ex. rel. Wilson v. Graham County Soil & Water Conservation Dist., 367 F.3d 245 (4th Cir. 2004)..... 11, 12, 16

TABLE OF AUTHORITIES – Continued

Page

Weddel v. Sec'y of Health and Human Svcs., 100 F.3d 929 (Fed. Cir. 1996) 13

Williams-Guice v. Board of Educ. of City of Chicago, 45 F.3d 161 (7th Cir. 1995) 5

STATUTES

31 U.S.C. § 3729 ..... 2, 3, 9

31 U.S.C. § 3730 ..... *passim*

31 U.S.C. § 3731 ..... *passim*

SCHOLARSHIP AND OTHER SOURCES

John T. Boese, *Civil False Claims and Qui Tam Actions*, Appendix H (2d ed. 2002) 5

Nation's Cities Weekly, Vol. 27, No. 39, Sept. 27, 2004 7

S. Rep. No. 99-345 (1986)..... 13

U.S. Bureau of Census, Federal, State and Local Governments, 2002 Census of Governments, *Preliminary Report No. 1*, July 2002 4

U.S. Bureau of Census, *Local Government Employment and Payroll*, March 2003 4

U.S. Department of Labor, Bureau of Labor Statistics, *Career Guide to Industries, State and Local Government (Excluding Education and Hospitals)*, Feb. 27, 2004..... 7

U.S. Department of Labor, Bureau of Labor Statistics, *Industry at a Glance*, December 29, 2004 5

INTEREST OF *AMICI CURIAE*[1]

The International Municipal Lawyers Association (IMLA) is a nonprofit professional organization that serves as a resource for local government attorneys. IMLA is an advocate for the nation's local governments, and provides its 1,400 members with information about and solutions to the legal issues facing local municipalities.

The National League of Cities (NLC) represents more than 18,000 United States cities, villages, and towns. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance, and to serve as a national resource and advocate for the municipal governments it represents.

Together these organizations represent the interests of local governments throughout the United States. This Court recently held that local governments may be sued under the False Claims Act. *Cook County, Illinois v. United States ex rel. Chandler*, 538 U.S. 119 (2003). IMLA and NLC therefore have an immediate interest in whether the six-year limitations period applied by the False Claims Act to *qui tam* and federal government actions based on an employer's fraud and deceit applies as well to individual claims of retaliation against whistleblowers. Resolution of this question is vitally important to all employers, but especially to local governments with limited resources and complicated civil service regulatory schemes, who face the

---

[1] The parties' consent to the filing of this *amicus* brief has been lodged with the Clerk of this Court. In accordance with rule 37.6, *amici* state that no counsel for either party has authored this brief in whole or in part, and no person other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief.

prospect of extended periods of liability for double back pay and reinstatement with seniority under 31 U.S.C. § 3730(h).

STATEMENT OF THE CASE

IMLA and NLC adopt the Statement of the Case set forth in the Brief for Petitioner.

SUMMARY OF ARGUMENT

This case illustrates how statutory ambiguity can lead to absurd results. In 1986, Congress amended § 3730 of the False Claims Act, 31 U.S.C. § 3729 *et seq.*, to add, among other things, a cause of action for retaliation when an employer discharges or discriminates against a whistleblower who has initiated or assisted with the prosecution of a false claims action. As a result, § 3730 now authorizes two types of private actions under the False Claims Act: (1) *qui tam* actions by private individuals brought as relators on behalf of the United States based on violations of § 3729 of the Act (subject to specific procedural requirements) and (2) individual retaliatory discharge claims based on specific misconduct directed towards the individual (not subject to the same unique procedures).

Until 1986, § 3731 of the Act applied a six-year statute of limitations to all actions under § 3730 – which originally did not refer to retaliation. Once the retaliation provision was enacted, Congress amended § 3731 to state that the limitations period applies only to claims based upon "a

violation of § 3729," and accordingly, the limitations period begins to run from the date of the § 3729 violation. 31 U.S.C. § 3731(b)(1). Section 3731 is silent as to the limitations period for retaliatory discharge claims.

The Fourth Circuit, relying on a decision from the Seventh Circuit, held that the six-year limitations period that applies to false claims actions in general should also apply to actions for retaliatory discharge. Because the six-year period provided in § 3731(b) runs from the date of the § 3729 violation, the Fourth Circuit acknowledged that some employee claims could be barred even before an act of retaliation occurs. Conversely, other employees suffering retaliation will have an incentive to wait until near the end of the six-year limitations period to file suit in order to recover as much double back pay as possible. The Fourth Circuit reached this result despite the fact that its interpretation puts the False Claims Act's retaliatory discharge provisions at odds with every other retaliatory discharge and whistleblower statute, and despite the fact that its ruling is at odds with the universally accepted rationale that the public interest is served by shorter, rather than longer, limitations periods for claims involving reinstatement and back pay.

The public interest simply is not served by extending the period that employers, and public employers in particular, can be subject to claims for *double* back pay with interest and reinstatement *with seniority*, as required under the False Claims Act. An extended period of time in which damages can mount and existing employees can gain seniority would overtax limited local resources and complicate an already complex process of civil service employment and advancement. Thus, the only reading of § 3731 that is consistent with Congressional intent and

the public interest is that retaliatory discharge claims under § 3730(h) accrue at the time of the retaliatory conduct and are subject to applicable state statutes of limitations for such actions.

ARGUMENT

A. The Fourth Circuit's Interpretation of the False Claims Act Would Cause Local Governments to Suffer Widespread and Unique Harm Contrary to the Public Interest.

In *Cook County, Illinois v. United States ex rel. Chandler*, 538 U.S. 119 (2003), this Court held that local governments and municipal corporations are "persons" within the meaning of the False Claims Act. That ruling exposed more than 87,000 local governments to claims under the False Claims Act. *See* U.S. Bureau of Census, Federal, State and Local Governments, 2002 Census of Governments, *Preliminary Report No. 1*, July 2002 *available at* http://ftp2.census.gov/govs/cog/2002COGprelim_report.pdf (as of 2002, there were nearly 87,900 local governments in the United States, including over 3,000 county governments, over 19,400 municipal governments, over 16,500 townships, over 13,500 school districts and over 35,100 special districts).

Local governments account for a large percentage of full-time employers in the United States; as of July 2003, there were approximately 11.569 million full-time equivalent local government employees, including employees in the education system and hospitals. *See* U.S. Bureau of Census, *Local Government Employment and Payroll*, March 2003, *available at* http://ftp2.census.gov/govs/apes/03locus.txt. The U.S. Department of Labor, Bureau of Labor Statistics reported that in 2003, local governments accounted for 10.5% of total United States full-time employment (by contrast, state governments accounted for only 3.5% and federal government for only 2.2% of full-time employment). U.S. Department of Labor, Bureau of Labor Statistics, *Industry at a Glance*, December 29, 2004, *available at* http://www.bls.gov/iag/government.htm.

Meanwhile, private False Claims Act filings are mushrooming. In 1987, only 33 relators filed *qui tam* False Claims Act suits. *See* John T. Boese, *Civil False Claims and Qui Tam Actions*, Appendix H, at H-1 (2d ed. 2002). By 1999, the annual total had grown to 481. *Id.* Between 1986 and 2001 *qui tam* relators received $745 million in bounties under the False Claims Act. *Id.* And because local governments administer and participate in so many federal programs, their exposure to potential False Claims Act suits is exponential as compared to private employers subject to the Act. *See Chandler*, 538 U.S. at 129 (observing that "local governments are commonly at the receiving end of all sorts of federal funding schemes. . . . "). Thus, the number of public employers affected by the decision in this case cannot be understated.

In cases involving both public and private employers, courts have acknowledged the importance of limiting the time that plaintiffs have to file employment-related claims. *See, e.g., Williams-Guice v. Board of Educ. of City of Chicago*, 45 F.3d 161, 162 (7th Cir. 1995) ("Claims arising out of employment generally are handled by short periods for action, because back pay is mounting (and because the injury, such as a discharge, is so apparent that it does not overtax anyone to require prompt action).");

Rogan v. Giant Eagle, Inc., 113 F. Supp. 2d 777, 788 (W.D. Pa. 2002) ("The short statutes of limitations in employment cases have a purpose – both backpay obligations and the difficulty of reintegrating a terminated worker into the workforce grow with each day that passes before an employment dispute is resolved. . . . ") (*quoting Early v. Bankers Life and Cas. Co.*, 959 F.2d 75, 80 (7th Cir. 1992) (*citing Delaware State Coll. v. Ricks*, 449 U.S. 250, 256-57 (1980))). For example, the Seventh Circuit has long recognized that

> [l]itigation about hiring, firing, and the assignment of work has more urgency about it. If a person is fired, someone else is likely to be given the work. Litigation may require the employer to pay twice for the same work. . . . If the litigation also produces an order to reinstate a wronged employee, or to hire a wronged applicant for work, this may cause loss to other innocent employees. [citations omitted] Disputes of this sort should be filed quickly and litigated briskly in order to hold to a minimum unnecessary loss to [the] employer and other employees – loss that ultimately must lead to lower wages for all employees.

Smith v. City of Chicago, 769 F.2d 408, 412-13 (7th Cir. 1985).

The impact of an extended period of liability for back pay when public employees are involved is of particular concern. The past five years have seen monumental changes in the level of responsibility (fiscal and physical) that must be borne by localities. In the wake of 9/11, local governments, as first responders and law enforcers, have been required to work with the Department of Homeland Security to improve local security and responsiveness in the event of another terrorist attack. *See* U.S.

Department of Labor, Bureau of Labor Statistics, *Career Guide to Industries, State and Local Government (Excluding Education and Hospitals)*, Feb. 27, 2004, at 1, *available at* http://www.bls.gov/oco/cg/cgs042.htm ("Local government employs more than three times as many service workers than does State government; most are firefighters and law enforcement workers."). And while the demand for local government services has increased, employment growth has been "dampened by budgetary constraints due to a slower growing economy, reductions in Federal aid, especially at the county level, and resistance from citizens to tax increases." *Id.* Indeed, the National League of Cities has recently reported that three of five cities are less able to meet their fiscal obligations and that local governments are facing critical fiscal problems due to increased costs for public safety, homeland security, and other federal mandates coupled with reductions in state aid to local governments. *Nation's Cities Weekly*, Vol. 27, No. 39, Sept. 27, 2004. Thus, double back pay awards, which compound with time, threaten local budgets.

Deepening local fiscal problems are not the only compelling reason why shorter periods of limitations for retaliation claims benefit the public. Local government employers are not in the same position as private employers regarding the types of personnel decisions that can be made. Local governments, unlike private employers, face § 1983 claims in personnel actions. Public employers also face unique obstacles when it comes to reinstatement, particularly with seniority. State civil service laws prescribe in detail criteria for hiring, placement, seniority, and discharge. Local governments cannot simply displace an existing employee in favor of a returning employee, nor

can they readily fund such positions. Creating and funding a position for an employee returning after a decade's absence could create new liabilities with respect to the rights of other public servants who have earned seniority during that time.

This Court need look no further than this case for a compelling example of the tremendous burden the Fourth Circuit's application of the six-year statute of limitations would place on public employers. Relator Karen Wilson alleges that she was constructively discharged in March 1997 because she was involved in reporting certain allegedly fraudulent claims made by her employer, the Graham County Water & Soil Conservation District. But she waited four years to bring this *qui tam* action and her action for wrongful discharge. If this Court affirms the Fourth Circuit, Ms. Wilson will return to the district court to prove her retaliation claim. If she is successful, and no appeal is taken, the Graham County District will have to pay her as much as ten years of back pay, doubled (essentially twenty years of salary), plus interest, compensate her for any special damages (including attorneys' fees and litigation costs) and reinstate her with seniority after a ten-year absence. *See* 31 U.S.C. § 3730(h). This potential million-dollar-plus liability would consume scarce public funds needed for law enforcement, homeland security, education and social welfare programs, and the like. Congress could not have intended for the period of liability for retaliatory discharge to so erode the public fisc or so threaten public safety.

B. A Proper Reading of § 3731 Shows That It Applies Only to the False Claims Provisions of § 3730.

Not only is the Fourth Circuit's reading of § 3731 at odds with the public interest in shorter limitations periods for wrongful discharge claims involving reinstatement and double back pay, it is at odds with the clear intent of Congress in amending the False Claims Act. Section 3729 of the False Claims Act describes the conduct constituting false claims in violation of the Act. Subsections 3730(a) through (g) set the procedure for either *qui tam* or federal government false claims actions. In 1986, Congress amended § 3730 to add § 3730(h), which creates a separate cause of action for an employee discriminated against for participating in false claims proceedings allowed in § 3730.

Section 3730(h) actions are not subject to the *qui tam* and government procedures – they are brought on behalf of the injured employee, not the United States, and are legally distinct from *qui tam* claims. Section 3731, on the other hand, sets the procedure for the *false claims* cause of action authorized in § 3730:

> Section 3731. ***False Claims*** Procedure.
>
> (a) A subpoena requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title may be served at any place in the United States.
>
> (b) A civil action under section 3730 may not be brought – (1) more than 6 years after the date on which the violation of section 3729 is committed, or (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States

charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.

(c) In any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(d) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.

31 U.S.C. § 3731 (emphasis added).

Ignoring the fact that § 3731's title states that it establishes the procedures for "false claims" actions and makes no mention of procedures for retaliation actions, the Fourth Circuit isolated § 3731(b)(1) from the remainder of the section. The Fourth Circuit concluded that because that subsection refers to § 3730 without specific limitation, Congress must have intended that the six-year limitation period in § 3731(b)(1) apply to retaliation actions authorized in § 3730(h). In so doing, the Fourth Circuit ignored the fact that subsection 3731(c) also refers to § 3730 without specific limitation in requiring that *"[i]n any action brought under section 3730,* the United States shall

be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence." 31 U.S.C. § 3731(c) (emphasis added). Under the Fourth Circuit's reasoning, therefore, the Government would have the burden to prove the elements of a retaliation claim under § 3730(h) because it is an "action brought under section 3730." This obviously was not Congress' intent, because § 3731, taken as a whole, was intended to apply only to *"false claims"* actions brought pursuant to § 3730 and not to retaliation claims.

C. The Fourth Circuit's Suggestion of an Equitable "Escape Hatch" Undercuts the Purported Goals of Repose and Administrative Simplicity.

Another flaw in the Fourth Circuit's decision is its blending of the law relating to statutes of limitation and repose and equitable tolling and estoppel into an unrecognizable mush. Causes of action for wrongful discharge or retaliation accrue at the time of the discharge or retaliatory act. *See United States ex. rel. Wilson v. Graham County Soil & Water Conservation Dist.*, 367 F.3d 245, 260 (4th Cir. 2004) (Wilkinson, J., dissenting) (observing that the majority's interpretation of § 3731(b)(1) "is at odds with all statutes of limitations for wrongful discharge, which commence with the occurrence of the retaliatory acts."). By pegging the start of the limitations period to the false claim rather than the retaliation, the Fourth Circuit's majority opinion "introduces an unprecedented oddity into state and federal law by disconnecting the statute of limitations for anti-retaliation claims from the actual retaliatory acts themselves." *Id.* at 257 (Wilkinson, J., dissenting). The Fourth Circuit dismissed these concerns, comparing § 3731(b)(1) to a statute of repose

that has the "'potential to block litigation before the tort occurs.'" *Id.* at 252 (*quoting Neal v. Honeywell, Inc.*, 33 F.3d 860, 865 (7th Cir. 1994)). The Fourth Circuit also concluded that Congress had merely "'opted for simplicity of administration.'" *Id.* at 253 (*quoting Storey v. Patient First Corp.*, 207 F. Supp. 2d 431, 444 (E.D. Va. 2002)); *see also Neal*, 33 F.3d at 865.

Even while conjecturing that retaliation will only infrequently occur more than six years after the filing of a false claim, the Fourth Circuit still felt constrained to address those "few instances" in a manner that undercuts its repose-and-simplicity rationale. The Fourth Circuit explained that in those situations, any limitations period can simply be jettisoned by applying equitable tolling or estoppel. *Id.* at 253-54. *See also Neal*, 33 F.3d at 866 (reasoning that "equitable tolling or estoppel would apply to § 3731(b)(1) if the firm patiently waited until six years from the false claim and then sacked the troublesome employee."). Thus, the Fourth Circuit has "undermine[d] the entire basis for a statute of limitations by counseling judges to exercise equitable tolling powers to recognize claims whenever the drawbacks of its interpretation of the FCA become too apparent to ignore." *Id.* at 257 (Wilkinson, J., dissenting). The result is that both Circuits – the Fourth and the Seventh – holding that Congress intended to enact a whistleblower limitations period of unprecedented length did so only by relying on an "escape hatch" to apply in those foreseeable situations where the limitations period undercuts Congress' goals of encouraging disclosure of false claims and protecting those who do so.

The problems with both the "statute of repose" analogy and, conversely, the equitable "escape hatch" are manifold. Notably, a statute of repose "cuts off a cause of

action at a certain time irrespective of the time of accrual of the cause of action." *Weddel v. Sec'y of Health and Human Svcs.*, 100 F.3d 929, 931 (Fed. Cir. 1996). Even more, it "operates as a statutory bar independent of the actions (or inaction) of the litigants – often before those litigants can even be identified," and as a result "prevents the cause of action from accruing in the first place." *Nesladek v. Ford Motor Co.*, 46 F.3d 734, 737 & n.3 (8th Cir. 1995). There is no indication that Congress meant to enact a statute of repose as opposed to a statute of limitations. In fact, such an interpretation would be inconsistent with Congress' goal to "assure those who may be considering exposing fraud that they are legally protected from retaliatory acts." S. Rep. No. 99-345, at 34 (1986), *reprinted in* 1986 U.S.C.C.A.N. 4266, 5299. Those who lose their right to sue for retaliation before they are ever retaliated against can hardly be said to have such assurance. Yet, in *Neal*, on which the Fourth Circuit relied, the Seventh Circuit indicated that § 3731(b)(1) "is another exhibit in this list" of statutes of repose. *Neal*, 33 F.3d at 860.

One district court, reviewing the "statute of repose" analysis in *Neal*, concluded that the Seventh Circuit "considered that the provisions of 31 U.S.C. § 3731(b) technically constitute a statute of limitations and not a statute of repose." *Storey*, 207 F. Supp. 2d at 445 n.21. Nevertheless, as applied by the Fourth and Seventh Circuits, § 3731(b), "[m]uch in the manner of a statute of repose . . . presents the inherent possibility that a plaintiff may be barred from court before he or she ever suffers an injury that otherwise would have been redressible." *Id.* at 445.

Apparently concerned about the absurd results presaged by their "statute of repose" analogy, both the Fourth and Seventh Circuits abandoned the analogy to pursue instead "equitable escape hatches." But it is not possible to have it both ways. The suggestion that § 3731(b)(1) is a statute of repose in disguise but at the same time subject to equitable tolling or estoppel is inherently contradictory. Although such equitable doctrines apply to statutes of limitations, "a statute of repose is typically an absolute time limit beyond which liability no longer exists and is not tolled for any reason. . . . " *First United Methodist Church of Hyattsville v. United States Gypsum Co.*, 882 F.2d 862, 866 (4th Cir. 1989). *See also Bradley v. Val-Mejias*, 379 F.3d 892, 897 n.1 (10th Cir. 2004) ("The difference between a statute of repose and a statute of limitations is that the former serves as an absolute time bar to suit whereas the latter can be tolled."); *Muñoz v. Ashcroft*, 339 F.3d 950, 957 (9th Cir. 2003) ("Statutes of repose are not subject to equitable tolling.").

Moreover, trying to rescue an absurd statutory interpretation through the threat of equitable exceptions undermines the values of repose and simplicity that the Fourth and Seventh Circuits purport to champion. "Equitable exceptions to [a] statutory limitations period should be sparingly applied. . . . The certainty and repose these provisions confer will be lost if their application is up for grabs in every case." *English v. Pabst Brewing Co.*, 828 F.2d 1047, 1049 (4th Cir. 1987).

The uncertainty is heightened here because it is not clear that either equitable doctrine would apply *before* a cause of action for retaliation has accrued. "Equitable tolling applies where the defendant has wrongfully deceived

or misled the plaintiff in order to conceal the existence of a cause of action." *Id.* at 1049. A plaintiff relying on equitable tolling must show that the defendant "attempted to mislead him and that the plaintiff reasonably relied on the misrepresentation by neglecting to file a timely charge." *Id.* Equitable estoppel applies where, "despite the plaintiff's knowledge of the facts, the defendant engages in intentional misconduct to cause the plaintiff to miss the filing deadline." *Id.* To invoke equitable estoppel, the plaintiff must show that his "failure to file in timely fashion is the consequence either of a deliberate design by the [defendant] or of actions that the [defendant] should unmistakably have understood would cause the [plaintiff] to delay filing his charge." *Id.* (*quoting Price v. Litton Bus. Sys., Inc.*, 694 F.2d 963, 965 (4th Cir. 1982)). But, where there has been no retaliation, there is no cause of action on which a plaintiff can file, timely or otherwise.

Price is instructive. There, the plaintiff sought relief through equitable estoppel from the 180-day limitations period on his age discrimination claim. Price was removed from his position as branch manager in February 1980, but for the next several months, his employer gave written assurances that it wanted Price to stay with the company and was seeking other opportunities for him. 694 F.2d at 964-95. Although no longer serving as branch manager, Price did not leave the company until May 1980. He filed his claim 178 days later, but well over 200 days after he was removed from his position. *Id.* at 965. Price argued that his employer was equitably estopped from asserting that the limitations period ran from February rather than May. The Fourth Circuit disagreed, holding that "the attempt to mitigate the harshness of a decision terminating an employee" does not give rise to equitable estoppel, even

where it stoked the employee's "hope for . . . a continuing employment relationship." *Id.*

If equitable estoppel does not apply *after* an adverse employment decision, even where, as in *Price*, the employer takes steps to lull the employee into believing he will remain with the company, it cannot apply to actions taken (or, more accurately, not taken) by an employer *before* any adverse employment decision has even been made. Moreover, equitable remedies are based on the "wrongdoing of the defendant." *English*, 828 F.2d at 1050. It is more than passing strange to suggest that an employer has engaged in "wrongdoing" by *not* retaliating against an employee. To equate a *failure* to commit wrongdoing with a subsequent wrongful act would expand equitable tolling or equitable estoppel beyond reason.

"Reliance on equitable tolling in these circumstances undermines the value of having a statute of limitations in the first place and vests courts with unpredictable discretion with regard to late claims." *Wilson*, 367 F.3d at 260-61 (Wilkinson, J., dissenting). *See also Cada v. Baxter Healthcare Corp.*, 920 F.2d 445, 452-53 (7th Cir. 1990) ("Statutes of limitations are not arbitrary obstacles to the vindication of just claims, and therefore they should not be given a grudging application. . . . The statute of limitations is short in . . . most employment cases because delay in the bringing of suit runs up the employer's potential liability; every day is one more day of backpay entitlements. We should not trivialize the statute of limitations by promiscuous application of tolling doctrines."). Even more daunting to cash-strapped local governments than a six-year statute of limitations is the prospect of perpetual liability under the False Claims Act whenever an employee is demoted or discharged. Disgruntled civil servants linking

adverse employment decisions to alleged false claims of a decade's vintage or more, then crying estoppel to avoid a limitations period that is already too long, could bankrupt local governments.

The Fourth Circuit's efforts to bolster its misreading of the statutory language and legislative history by relying on contradictory policy arguments that, ultimately, inject even more uncertainty into an already unsettled situation, must be rejected.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Fourth Circuit should be reversed.

Respectfully submitted,

JOHN CHARLES THOMAS
M. CHRISTINE KLEIN
HUNTON & WILLIAMS LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219
(804) 788-8755